APPEAL NO. 020952
FILED MAY 29, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on January 29, 2002. On the record, the hearing officer announced that he was leaving the record open to obtain additional information from Dr. R, a Texas Workers' Compensation Commission (Commission)-appointed doctor[1] and that the parties could submit written closing argument. The hearing officer recites that the record closed on March 13, 2002.

The hearing officer determined that the appellant (claimant) had not sustained an injury on _____, and did not have disability.

The claimant appeals, principally arguing that a report dated January 30, 2002 (the day after the CCH), from Dr. S, interpreting an MRI and recommending surgery, and operative reports dated March 18, 2002, should be considered newly discovered evidence warranting a remand under the standard set out in Appeals Panel decisions, citing Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). The respondent (carrier) responds, asserting that the claimant has not exercised due diligence (one of the criteria in the Black criteria) in presenting Dr. S's report to the hearing officer, and urging affirmance.

DECISION

Reversed and remanded.

One of the problems with this case, and the principal reason for our remand, is that evidently a number of things occurred after the CCH which are not in the record. Both parties state that the MRI, which was performed on January 11, 2002, "was in evidence at the time of the hearing," and the claimant represents that Dr. R's addendum report dated February 1, 2002, was in evidence as "Hearing Officer's Ex. 3." In the record before us, Hearing Officer's Exhibit No. 3 is Dr. R's report dated January 10, 2002, filed with the Commission on January 29, 2002. We have no addendum from Dr. R. Similarly, both parties reference the January 11, 2002, MRI, which they appear to believe was "before the Hearing Officer as an exhibit"; however, the only copy in the record is the copy attached to the claimant's appeal, which the claimant contends is newly discovered evidence. The hearing officer, in his decision, makes no reference or other indication regarding the addendum or MRI.

[1]The parties stipulated that Dr. R was a designated doctor, but the evidence indicates that more likely he was a Commission independent medical examination doctor or designated doctor to render an opinion as to the injury.

In evidence as Hearing Officer's Exhibit No. 3 is the January 10, 2002, report from Dr. R. In that report it was Dr. R's plan "to get an MRI scan then review the patient back and go from there." The hearing officer, on the record, stated that he was leaving the record open to obtain an addendum or comment from Dr. R regarding the MRI. Although the claimant's appeal and the carrier's response indicate that the hearing officer did so, neither any contact nor response is submitted for review. On the record, it was discussed that the claimant was seeing Dr. S the following day (January 30, 2002). Although the parties seem to agree that the record was to be left open only for Dr. R's addendum, it is not clear to us why Dr. S's report should not be considered. While we agree with the carrier that the claimant did not show due diligence in offering Dr. S's report and evidence of the scheduled March 18, 2002, surgery to the hearing officer and therefore the report, in and of itself, would not be considered newly discovered evidence under the Black criteria, because we are remanding the case for the reasons stated we also remand for the hearing officer to consider the proffer of Dr. S's January 30, 2002, report and the March 18, 2002, operative reports. If the hearing officer excludes those reports, he must state his reason for doing so.

The hearing officer, on the record, announced that he was leaving the record open to obtain additional information from Dr. R and that the parties would be allowed to submit written closing argument. The hearing officer's decision states that the record was closed on March 13, 2002. In the appeal file is a document dated March 18, 2002, from the claimant's attorney, submitting his closing argument. The document is date-stamped received by the Commission on March 19, 2002. There is no indication that this was seen or considered by the hearing officer. Nor is there any indication that the hearing officer advised the parties that he was going to be closing the record on March 13, 2002, and advising the parties that closing argument must be submitted by a date certain. No written closing argument from the carrier is in the appeal file. As part of the remand, the hearing officer is to allow the parties an opportunity to submit closing argument.

The heart of this remand is to emphasize that when the hearing officer makes representations on the record that the record is to be held open for a certain event, then the hearing officer has a duty to advise the parties and make as part of the record what events have transpired and to follow through with allowing closing argument and/or comment on whatever other information is obtained after the CCH.

We also comment on the hearing officer's finding of fact that "[p]ain is not an injury." That phrase, although used in some Appeals Panel decisions, has been overread and cited as an absolute, incontrovertible statement of the law. That is not the case. In Texas Workers' Compensation Commission Appeal No. 012813, decided January 3, 2002, the Appeals Panel stated:

> While in certain limited cases, the Appeals Panel has observed that pain alone is not necessarily an injury, this has occurred when there is no other objective or clinical indication of physical harm or damage to the claimant….

> The Appeals Panel has never held that pain resulting from a compensable injury cannot form the basis for disability.

While Appeal No. 012813 dealt with disability, we caution against an overreading of the statement that pain is not an injury and observe that pain can be, and frequently is, the symptom or indicator of an injury.

The case is remanded to the hearing officer, to indicate what contact was made with Dr. R, to admit into the record any response (apparently the February 1, 2002, addendum) and the MRI as hearing officer's exhibits, to rule on the admission of Dr. S's January 30, 2002, report and the operative reports, and to allow comment on any newly submitted evidence and/or closing argument from the parties. The hearing officer may wish to conduct an additional hearing on remand. The hearing officer is then to consider all the evidence in the record and make his decision on the disputed issues.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **HIGHLANDS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

HIGHLANDS INSURANCE GROUP
JAMES W. HOOKER
10370 RICHMOND AVENUE
HOUSTON, TEXAS 77042.

Thomas A. Knapp
Appeals Judge

CONCUR:

Elaine M. Chaney
Appeals Judge

Gary L. Kilgore
Appeals Judge